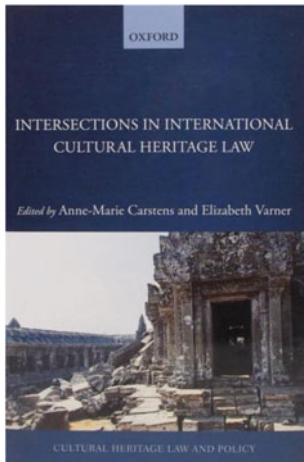


LIBRARIAN'S PICK



Intersections in International Cultural Heritage Law

Edited by **Anne-Marie Carstens and Elizabeth Varner***

Book review by **Charlotte Mohr**, ICRC Reference Librarian for the collections on the ICRC's history and activities

.....

Since the United Nations Educational, Scientific and Cultural Organization (UNESCO) Conventions of the early 1970s¹ first recognized the public and collective value of cultural heritage – a value transcending national boundaries and thus deserving of protection at the international level – the protection of cultural heritage has grown into its own distinctive branch of international law. The early twenty-first century has seen the adoption in rapid succession of instruments expanding the notion of cultural heritage and seeking to fill gaps in the legal regime protecting it from destruction and misappropriation.² Moving beyond the initial monumentalist vision, they now better encompass the intangible dimensions of cultural heritage and recognize its centrality to human identity and community life. The destruction and pillage of sites of incomparable

* Published by Oxford University Press, Oxford, 2020. Full text access for ICRC staff is available at: <https://doi.org/10.1093/oso/9780198846291.001.0001>. Previously a Visiting Professor at Georgetown University Law Center, Anne-Marie Carstens is Law School Assistant Professor and Director of Lawyering at the University of Maryland. She has served as an Expert Adviser on cultural property issues at the US Department of State and chaired the Cultural Heritage and the Arts Interest Group of the American Society of International Law. Elizabeth Varner is Adjunct Professor at the Robert H. McKinney School of Law, teaching art, museum, and cultural heritage law and entertainment law. As a Staff Curator, she assists with guiding the management and use of over 202 million cultural and natural history objects. The advice, opinions and statements contained in this article are those of the author/s and do not necessarily reflect the views of the ICRC. The ICRC does not necessarily represent or endorse the accuracy or reliability of any advice, opinion, statement or other information provided in this article.

ICRC Library

The “Librarian’s Pick” is a regular section of the *Review* in which one of the International Committee of the Red Cross’s (ICRC) librarians picks and writes about their favourite new book relating to international humanitarian law, policy or action, which they recommend to the readers of the journal.

The ICRC Library welcomes researchers interested in international humanitarian law (IHL) and the institution’s work throughout the years. Its online catalogue is the gateway to the most recent scholarship on the subject, documents of diplomatic and international conferences, all ICRC publications, rare documents published between the founding of the ICRC and the end of the First World War, and a unique collection of military manuals. The Library Team also publishes research guides in order to help researchers access the full texts of the most relevant and reliable sources in the field of IHL and the ICRC, as well as a comprehensive IHL Bibliography, with three issues every year.

The online catalogue is available at: library.icrc.org. For more information on the research guides, see: blogs.icrc.org/cross-files/category/research-guide. To subscribe to the IHL Bibliography, email library@icrc.org with “IHL Bibliography subscription” in the subject line.

value in Mali, Syria, Iraq and Yemen, notably, have acted as powerful and tragic reminders of the enduring disconnect between law and reality, raising the issue’s urgency. Growing public concern and political will are further motivated by cultural property trafficking being used to finance armed groups and organized crime. Those developments have attracted considerable critical attention in recent years, leading to a burgeoning – if not yet fully bloomed – body of literature.

However, provisions for the protection of “cultural property” or “cultural heritage” in international legal instruments far predate the birth of a dedicated branch of public international law. *Intersections in International Cultural Heritage Law* is an invitation to look beyond the discipline’s “breaking news”. The book’s opening premise holds that “the content of international legal rules designed to protect and to foster the preservation of cultural heritage has emerged almost exclusively within other fields of international law”.³ In fifteen contributions, scholars and practitioners look at the diversity of sources, actors and institutions

1 Namely the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage.

2 Most notably, the 2001 Convention on the Protection of the Underwater Cultural Heritage, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

3 Anne-Marie Carstens and Elizabeth Varner, “Intersections in Public International Law for Protecting Cultural Heritage Law: Past, Present, and Future”, in *Intersections in International Cultural Heritage Law*, p. 1.

behind the composite development of the international legal protection of cultural heritage. They zoom in on key intersections between international cultural heritage law and other fields of international law, including international humanitarian law (IHL), international criminal law, international human rights law, and the law of the sea, evaluating recent developments and future trajectories under this interdisciplinary light.

The aim of the volume's cross-cutting approach is twofold. First, it allows for a historical investigation of the interactions between public international law and the protection of cultural heritage. Together, the contributions build a clear picture of how the latter has been shaped by the former, with founding principles of international law such as sovereignty and territoriality constraining the current regime of the protection of cultural heritage. Perhaps more surprisingly, they also illuminate instances where the opposite is true, where principles affirmed in the context of cultural heritage protection were later accepted outside of a cultural heritage-specific context.⁴ Second, focusing on intersections between strains of international cultural heritage law and associated areas of public international law proves key to identifying gaps and loopholes in the current protective regime and potential measures to resolve enduring protection challenges.

The volume is divided into five thematic parts, with the editors providing connective tissue through an introduction to each part. The first is quite logically dedicated to IHL, historically the first body of international law to include provisions to safeguard cultural property. What are the consequences of the current protective regime finding its roots in measures meant for wartime? Patty Gerstenblith,⁵ for instance, sees in the bifurcation between IHL instruments and rules on the transnational movement of cultural objects in peacetime a disconnect that provides to this day a less robust protection for movable objects than for immovable sites. She argues that although IHL prohibits and criminalizes pillage and misappropriation, it fails to address the subsequent trafficking of cultural objects illegally removed from conflict zones, while the conventions regulating the international movement of cultural objects⁶ have limited efficacy in situations of armed conflict. Thus, the lack of intersection between the wartime and peacetime legal regimes leaves a gap in the protection of movable cultural heritage, which fails to prevent cultural objects illegally removed from conflict zones from entering the international art market.

The second section of the volume turns to the criminalization and prosecution of cultural heritage-based offences. Anne-Marie Carstens' contribution recounts how the inclusion of such offences as war crimes was far

4 Such as the acceptance of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict's applicability to situations of non-international armed conflict, which arguably smoothed the path to the adoption of Additional Protocol II to the 1949 Geneva Conventions.

5 Patty Gerstenblith, "The Disposition of Movable Cultural Heritage", in *Intersections in International Cultural Heritage Law*.

6 The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 Convention on Stolen or Illegally Exported Cultural Objects.

from self-evident in the historical development of international criminal law. Karolina Wierczyńska and Andrzej Jakubowski then turn to the landmark 2016 *Al Mahdi* case⁷, the much-discussed first prosecution of a cultural heritage crime before the International Criminal Court. Their analysis centres on the reparation order, highlighted as an important feature in the evolving system of individual criminal responsibility for cultural heritage crimes, and on how the Court grappled with the issues of identifying victims and quantifying the damage. Janet Blake's chapter⁸ echoes Patty Gerstenblith's IHL contribution discussed above. Blake addresses a similar question – how to ensure that an illegally removed cultural object remains stained with illegality as it travels and moves through different jurisdictions – this time through the contribution of mechanisms for fighting transnational organized crime. She points out the limits of resting on the prevailing approach to combating trafficking based on the international legal regime protecting cultural property. She considers the alternative international law enforcement approach, stressing the similarities between cultural heritage trafficking and other forms of illegal trade and organized crime activities.

The third part of the volume is dedicated to the action of the different United Nations (UN) bodies. Contributions focus on the spearheading role of UNESCO, the implications of the growing involvement of the UN Security Council and Human Rights Council (HRC), and the jurisprudence of the International Court of Justice. Kristin Hausler's chapter⁹ contrasts the framing of cultural heritage-based offences as violations of international human rights law by the HRC and as threats to peace and security by the Security Council. She commends the HRC's human rights-based approach for its inclusion of intangible cultural heritage, such as religious and cultural practices, under special threat in ethnically or religiously motivated armed conflicts. Now that the destruction of both tangible and intangible cultural heritage is recognized as a matter both of peace and security and of respect for human rights, she argues, better coordination between the HRC and the Security Council is necessary to guarantee a holistic approach to the protection of cultural heritage.

The volume's fourth part looks at special legal regimes for World Heritage Sites and underwater cultural heritage. Using the World Heritage Convention as a case study, Lucas Lixinski and Vassilis P. Tzevelekos¹⁰ find the lack of attention given to State responsibility in the development of international cultural heritage

7 Ahmad Al Faqi Al Mahdi, a leader within the Islamist armed group Ansar Eddine, was prosecuted in 2016 by the International Criminal Court for his role in the destruction of Timbuktu's historic mausoleums in 2012. He pleaded guilty, received a nine-years prison sentence and was ordered to pay reparations. Karolina Wierczyńska and Andrzej Jakubowski, "The *Al Mahdi* Case: From Punishing Perpetrators to Repairing Cultural Heritage Harm", in *Intersections in International Cultural Heritage Law*.

8 Janet Blake, "Trafficking in Cultural Property: Where Cultural Heritage Law and the International Fight against Transnational Organized Crime Coincide", in *Intersections in International Cultural Heritage Law*.

9 Kristin Hausler, "The UN Security Council, the Human Rights Council, and the Protection of Cultural Heritage: A Matter of Peace and Security, Human Rights, or Both?", in *Intersections in International Cultural Heritage Law*.

10 Lucas Lixinski and Vassilis P. Tzevelekos, "The World Heritage Convention and the Law of State Responsibility: Promises and Pitfalls", in *Intersections in International Cultural Heritage Law*.

law a key barrier to its efficacy. Sarah Dromgoole's chapter¹¹ on the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage is a thought-provoking outlier in the book: while most contributors identify gaps in the law, Dromgoole instead points out the problematic side effects of the 2001 Convention's wide material scope of application. She argues that a strict interpretation of its blanket approach to what constitutes underwater cultural heritage is bound to pose real challenges. Should the tons of silver recovered from a shipwreck truly be considered cultural heritage? What about wrecks containing hazardous materials, such as munitions or mustard gas? The chapter is an interesting contribution to the important debates on how cultural heritage is defined in international law. Past instruments have alternatively espoused a comprehensive approach or a selective approach based on a threshold of cultural significance and/or prior identification of sites and objects, and neither option appears to be without pitfalls.

The protection of cultural heritage involves different and sometimes competing interests at the international, national and community levels. The volume's fifth and final part looks at the challenges arising from that competition. Contributors point out the limitations of current instruments in accommodating international and community interests. Vanessa Tümsmeyer makes a strong case for a reinterpretation of a State's duty to protect cultural heritage in light of its human rights obligations.¹² She develops a "functions-based" approach to the appraisal of cultural heritage in order to reframe its protection in human rights terms. Bridging conceptual gaps between international cultural heritage law and international human rights law, she argues, is key to preventing the marginalization or destruction of cultural heritage outside of national cultural identity. Robert Peters' contribution¹³ fleshes out the tensions between the increased recognition of the universal value of cultural heritage and legal instruments that remain State-centred. The unidimensional focus of States on national export laws to protect their own heritage makes for an illuminating example. Only the harmonization of national import and export laws, Peters argues, will help curb the illegal movement of cultural objects.

Ultimately, the book's major contribution lies in its ability to identify protection gaps precisely at the intersections between international cultural heritage law and other branches of public international law. Its authors look for ways to close, or at least minimize, such gaps by improving the articulation between the different legal regimes and the communication between implementing institutions. The book shows how the interwoven threads of

11 Sarah Dromgoole, "The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage and Its Principles Relating to the Recovery and Disposition of Material from Shipwrecks", in *Intersections in International Cultural Heritage Law*.

12 Vanessa Tümsmeyer, "Bridging the Gap between International Human Rights and International Cultural Heritage Law Instruments: A Functions Approach", in *Intersections in International Cultural Heritage Law*.

13 Robert Peters, "Nationalism versus Internationalism: New Perspectives beyond State Sovereignty and Territoriality in the Protection of Cultural Heritage", in *Intersections in International Cultural Heritage Law*.

treaties, soft-law instruments, and actors involved in the protection of cultural heritage at the international level all form an intricate and evolving net. To tighten the net, the book seems to argue, we should start to tie up the loose threads found at the titular “intersections in international cultural heritage law”.